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No. 89-433

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DIRECTOR OF REVENUE, STATE OF MISSOURI,
Petitioner,

v.

FREDERICK & JOSEPHINE HACKMAN

On Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri

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BRIEF OF *AMICUS CURIAE* MISSOURI FEDERATION OF CHAPTERS OF THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES IN SUPPORT OF RESPONDENTS

MICHAEL J. KATOR
Counsel of Record

DAVID WEISER
KATOR, SCOTT & HELLER
1275 K Street, N.W.
Suite 950
Washington, D.C. 20005-4006
(202) 898-4800
Attorneys for *Amicus Curiae*

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QUESTION PRESENTED

Whether the Constitution permits a state to provide by statute that a decision invalidating one of its income tax provisions shall be accorded full retroactive effect and shall entitle taxpayers to refunds.

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The Missouri Federation of Chapters of the National Association of Retired Federal Employees submits this brief *amicus curiae* in opposition to the Director of Revenue's petition for certiorari. *Amicus* submits that the petition fails to raise a substantial federal question. The decision below, predicated wholly on state law grounds, occasions no basis for review in this Court.*

INTEREST OF *AMICUS CURIAE*

The Missouri Federation of Chapters ("Missouri Federation") is a subordinate unit of the National Associa-

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* The parties' letters consenting to Missouri Federation's participation in this case as *amicus curiae* have been filed with the Clerk.

tion of Retired Federal Employees ("NARFE"). NARFE is a nonprofit, incorporated association dedicated to furthering the interests of the aged and aging, and, in particular, the interests of federal annuitants and employees. NARFE, and the state federations, identify issues of particular concern to federal annuitants and, through its newsletters and the state and local chapter network, inform its members of these issues, and act upon these issues to further the members' common goals. To this end, the Missouri Federation monitors developments in state and federal governments and, when circumstances so warrant, enters into litigation to protect the rights of its members. It was in this capacity that NARFE participated as *amicus curiae* in this case in the court below and in *Davis* v. *Michigan Department of Treasury*, 109 S.Ct. 1500 (1989), the case that impelled the litigation underlying the present petition for certiorari. The Federation is comprised of 51 chapters throughout the State of Missouri, with a combined total membership of over 7,300 Missouri taxpayers.

STATEMENT

This case arises in the wake of this Court's decision last term in *Davis* v. *Michigan Department of Treasury*, 109 S.Ct. 1500 (1989). In *Davis*, this Court held that Michigan's taxation of annuities of retired federal employees (while exempting state and municipal pensions) violated 4 U.S.C. § 111 as well as the intergovernmental tax immunity doctrine embodied in the Supremacy Clause. Like Michigan, Missouri too gave a preference to state and local annuitants at the expense of federal annuitants. In this case, however, no attempt was ever made to sanction Missouri's now-repealed income tax law. Rather, the dispute here focused solely on whether the state could avoid its statutory obligation to refund the unconstitutionally collected taxes.

Pursuant to Missouri law, respondents Frederick and Josephine Hackman (as well as several thousand other similarly situated Missouri taxpayers) filed amended returns for the tax years 1985 through 1988. Respondents' refund request was denied administratively, but on petition for review the Supreme Court of Missouri reversed, holding that refunds were due. Dissatisfied with its highest court's construction of the State's own legislation, the State now petitions this Court for certiorari.

REASONS FOR DENYING THE WRIT

After this Court's decision in *Davis* v. *Michigan*, almost half the states were faced with the question of whether they would have to revise their income tax laws and whether they would have to pay refunds of unconstitutionally exacted taxes. So far, however, the court below is the only state court of last resort to address these issues. It concluded that Missouri's statutory tax refund provisions mandated refunds, and that there was no occasion for consideration of whether *Davis* v. *Michigan* would be applied prospectively-only because the State had statutorily consented to full retroactive application of that decision.

We do not dispute that issues may arise from the various states in the aftermath of *Davis* v. *Michigan* that may warrant this Court's review. Indeed, as this Court has recognized, a decision to deny refunds of unconstitutionally collected taxes raises due process considerations. *See Ward* v. *Love County*, 253 U.S. 17, 24 (1920); *Montana Nat'l Bank of Billings* v. *Yellowstone County*, 276 U.S. 499, 504-05 (1928). But this is not a case of a denial of refunds. Rather, in this case a state consented to full retroactive application of a decision invalidating its tax laws. Accordingly, it does not raise these constitutional concerns. While the retroactive or non-retroactive application of a court decision implicates Due Process rights of individuals, a state possesses no

comparable rights. Even assuming a state possessed such a right, whatever its source, certainly this putative right would be subject to waiver. The court below interpreted Missouri law as creating just such a waiver. It is not the province of this Court to review state court decisions based solely on constructions of state law. Accordingly, the petition should be denied.

1. The Director of Revenue frames his question presented as

> Whether federal principles of retroactivity must be applied by state courts in determining the retroactive/prospective application of this Court's opinions.

Pet. at *i* (footnote omitted). As an initial matter, it was the court below and not this Court that invalidated Missouri's discriminatory income tax law. Thus, more appropriately, petitioner's question should be: "Whether *federal* principles of retroactivity must be applied by state courts in determining the retroactive/prospective application of *state court* opinions." The mere statement of this proposition demonstrates its utter implausibility.

Either way, petitioner's argument is that the State of Missouri has a constitutional right to the application of the analysis set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). The Director of Revenue contends that his right to application of the *Chevron* analysis is anchored in the Supremacy Clause. The Supremacy Clause provides:

> This constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land.

U.S. Const. art. VI, cl. 2. Petitioner points to no language in the Constitution (as there is none) from which a requirement to apply *Chevron* could be construed. Nor does petitioner assert that any law of Congress requires states to apply *Chevron*. Thus, petitioner's assertion must be that *Chevron*, as a pronouncement of this Court, is

tantamount to federal common law binding on all the states.

To be sure, this Court's interpretations of the Constitution are the supreme law of the land. *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958). So, too, are the lower federal courts bound by this Court's pronouncements. But this Court's retroactivity analysis in *Chevron* did not purport to be an exposition of a constitutional principle. Indeed, as this Court reiterated in *Griffith* v. *Kentucky*, 479 U.S. 314, 320 (1987), *quoting Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965), "the Constitution neither prohibits nor requires retrospective effect" be accorded this Court's decisions. In *Chevron* this Court merely restated a balancing test which had been variously stated and applied since *Great Northern R. Co.* v. *Sunburst Oil Refining Co.*, 287 U.S. 358 (1932).

Individuals' entitlement to application of retroactivity analysis is distinct from that of states. Individuals adversely affected by state action could claim an entitlement to *Chevron*-like balancing; the Due Process Clause would require some balancing along the *Chevron* lines before a decision affecting an individual's rights could be applied prospectively only. But states may not insist on the converse: states are not "persons" within the meaning of the Fifth (and Fourteenth) amendments. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-24 (1966).

Petitioner's "entitlement" to application of the *Chevron* analysis cannot be found in the Supremacy Clause, the Due Process Clause, or, we submit, federal common law. *See Erie R. Co.* v. *Tomkins*, 304 U.S. 64 (1938). As such, states are not required to utilize *Chevron* in determining whether to give prospective-only effect to their decisions. The Supreme Court of Missouri's refusal to invoke *Chevron* did not infringe on the Director of Revenue's constitutional rights.

Finally, even if there were such a right (*i.e.*, the Director of Revenue had a constitutional right to application

of the *Chevron* analysis by the Supreme Court of Missouri), the Missouri General Assembly could waive this putative constitutional right. That is, the legislature could provide that even though the Director of Revenue was entitled to application of *Chevron* analysis, the state would relinquish this entitlement and provide that decisions invalidating tax laws would in all cases be applied retroactively. This is precisely what Missouri's highest court found the effect of the statutory refund provisions to be.

The Director of Revenue has no right to application of the *Chevron* analysis and even if he had such a right Missouri's General Assembly waived it. The Director of Revenue's petition fails to raise a substantial federal question and accordingly should be denied.

2. Petitioner asserts that the Missouri Supreme Court improperly based its decision on a conclusive interpretation of the state refund statute, without reaching the *Chevron* analysis. Yet as this Court has repeatedly held, deference to state law in cases such as this is entirely proper and, indeed, required.

This Court has on a number of occasions had the opportunity to consider the issue of retroactive application of its decisions invalidating state tax laws. Uniformly, this Court has held that this issue must be answered, in the first instance, by recourse to state law. In *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), the Court was specifically asked to decide the retroactivity/refund issue arising from a challenge to Hawaii's liquor tax. The paramount significance of state law was explicitly recognized by the Court in its refusal to decide the retroactivity question:

> These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts. Also, the fed-

> eral constitutional issues involved may well be intertwined with, *or their consideration obviated by*, issues of state law. . . . We are reluctant, therefore, to address them in the first instance.

466 U.S. at 277 (emphasis added). Moreover the Court presaged the potentially conclusive role of state law in its footnote to the above quote: "It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law." *Id.* at n. 14. *Bacchus* thus makes clear that state law may indeed provide the last word on a retroactivity/refund issue.

This ruling in *Bacchus* has been followed more recently in *Tyler Pipe Industries, Inc.* v. *Washington State Department of Revenue*, 483 U.S. 232 (1987). *Tyler Pipe* considered the constitutionality of Washington's business and occupation tax. Upon striking down the tax, the Court addressed the State's specific request that the decision be applied prospectively only. Citing *Bacchus*, the Court refused to "take it upon itself in this complex area of state tax structures to determine how to apply its holding." 483 U.S. at 252. Again, the Court stated that "the federal constitutional issues involved may well be intertwined with, *or their consideration obviated by*, issues of state law." *Id.* (emphasis added). *See also Williams* v. *Vermont*, 472 U.S. 14, 28 (1985) (remanding to Supreme Court of Vermont as to the appropriate remedy in tax case, given "possible relevance of state law").

We need not question whether deference to state law is necessary in cases between private individuals, as the authorities upon which petitioner relies suggest. *See Cohn* v. *G.D. Searle*, 748 F.2d 460, 463 (3d Cir. 1985); *Love* v. *Johns-Manville of Canada, Inc.*, 609 F.Supp. 1457, 1460 (D. N.J. 1985). Different rules apply in "mere private cases" as opposed to matters of "great national concern." *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). Notwithstanding whether a state could permissibly enact a statute requiring all court decisions in

the state to be applied fully retroactively, certainly a state could enact legislation decreeing that all court decisions *adverse to the state* would be applied fully retroactively. Just as a party in litigation may waive a right it might possess (as petitioner would assert Michigan did in *Davis* by acquiescing to retroactive application of that decision, 109 S.Ct. at 1508), so too can a state legislature as a matter of policy determine that adverse decisions will be applied fully retroactively.

The Supreme Court of Missouri held that by the enactment of its statutory refund mechanisms the Missouri General Assembly consented to retroactive application of decisions invalidating its tax laws. Given that that determination is unreviewable in this Court, petitioner has a colorable claim here only if it can show that the Constitution prohibits Missouri from adopting such a statute. Petitioner has not attempted to shoulder this burden, and, we submit, it is doubtful he could.

3. Petitioner asserts that his petition should be granted because of similarities between this case and two cases on the Court's current calendar for reargument, *American Trucking Association* v. *Smith*, No. 88-325, and *McKesson Corporation* v. *Division of Alcoholic Beverages & Tobacco*, No. 88-192. Petitioner goes so far as to state, in a footnote to the "Question Presented," that *American Trucking*, *McKesson* and this case concern "identical remedial issues." Pet. at *i* n.1. Thus, the petition was "filed to protect Petitioner's interests and rights pending the Court's decision in those cases." Pet. at *i* n.1. *See also* Pet. at 6-7, 16.

The questions presented in *American Trucking* and *McKesson* do not overlap in any respect with this case in its present posture. In *McKesson* and *American Trucking*, the questions for reargument are:

> 1. When a taxpayer pays under protest a state tax found to violate clearly established law under the

Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?

2. May a State, consistently with the Due Process Clause of the 14th Amendment, remedy the effects of a tax found to discriminate against an interstate business in violation of the Dormant Commerce Clause by retroactively raising the taxes of those who benefited from the discrimination?

McKesson Corporation v. *Division of Alcoholic Beverages and Tobacco*, 109 S. Ct. 3238 (1989).

Taking the second question first, it is plain that the present posture of this case makes the "retroactive tax hike" option inapplicable. Nothing in this case involves an attempt by the State of Missouri retroactively to increase taxes as a manner of remedying the harm to Missouri taxpayers whose federal annuities were discriminatorily taxed. Indeed, Missouri has already begun to pay the refunds and has enacted revenue measures to finance its total obligation.

The second question posed on reargument essentially is whether retroactive relief is always mandated in cases involving unconstitutional taxation. Even assuming the Court answers this question in the negative, this would presumably do no more than sanction *Chevron*'s prospective-only relief in limited circumstances. As noted above, the Missouri General Assembly has already foreclosed prospective-only relief in cases invalidating Missouri tax laws. Thus this question could only arise here if the Court were first to accept petitioner's assertion of a right to application of the *Chevron* analysis.

The Director of Revenue asserts that his petition should be granted because it bears a surface resemblance to *McKesson* and *American Trucking*. Because the

threshold issue he presents is not under consideration in *McKesson* or *American Trucking*, his petition must stand or fall on its own merits. As noted above, its principal argument does not warrant consideration by the Court, and accordingly the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of the State of Missouri should be denied.

Respectfully submitted,

MICHAEL J. KATOR
Counsel of Record

DAVID WEISER
KATOR, SCOTT & HELLER
1275 K Street, N.W.
Suite 950
Washington, D.C. 20005-4006
(202) 898-4800
Attorneys for *Amicus Curiae*

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